

# Trial of Actions under the Code

CHARLES E. CLARK†

One of the greatest obstacles to the full success of the code reform of pleading in this country has been the existence of the constitutional requirement that the right of trial by jury "in all cases in which it has been heretofore used shall remain inviolate forever."<sup>1</sup> It is but natural that this should have had a deterrent effect upon the reform. That reform had for its main objective the abolition of forms and the establishment of a more flexible and direct procedure. Here, however, at the very outset a rigid rule was met, one defined by ancient forms and precedents.<sup>2</sup> Undoubtedly the constitutional provision does introduce an arbitrary limitation into a field where flexibility should be the general objective. It is proposed to show, however, that this absolute requirement need not and should not be interpreted so as to do away with all or even the greater number of benefits of the code reform.

The decisions under the code would seem to indicate two main problems: first, whether the pleadings must definitely show the action to be one "at law" or "in equity," and thus point out the form of trial, or should merely give the "facts" or the respective stories of the parties litigant; and second, whether the codes themselves have widened the application of the jury trial requirement. These problems will be considered in order.

Under the common law system of pleading, the pleader, since he was forced to choose a tribunal and a form of action fitting what he thought was his case, was compelled to disclose quite fully the legal theory upon which he was proceeding. The very court in which the case was brought indicated that a jury trial was expected, while yet finer distinctions of legal theory were drawn by the choice of the form of remedy. The history of this procedural development is familiar to all students. True, it is often asserted even now that the common law procedural distinctions are fundamental and inherent, but it is fairly clear that this is an explanation *post hoc*. Writs were purchased by the litigants from the king's clerks in chancery. With the passage

---

\*Professor of Law, Yale University School of Law.

<sup>1</sup>*Cf.* N. Y. Constitution, Art. I, sec. 2.

<sup>2</sup>For the construction of the constitutional provision as preserving the fundamentals of trial by jury existing at the time of the adoption of the constitution, see *Sands v. Kimbark*, 27 N. Y. 147 (1863); *Smith v. Western Pacific Ry. Co.*, 203 N. Y. 497 (1911); A. W. Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 *Harv. L. R.* 669, reprinted in *Fundamentals of Procedure*, ch. III.

of time, these clerks came to consider themselves more and more bound by precedent in the formation of writs. It was more the accident of the existence or non-existence of a definite precedent which determined the development of the forms of action, rather than any definite idea that justice could be more expeditiously administered by them.<sup>3</sup> The long-protracted struggle against this system resulted in the legislative decree abolishing these forms and substituting therefor an entirely different pleading objective, the pleading of the *facts* only, that is, the respective stories of the parties litigant.<sup>4</sup>

Now the objective of giving only a story of the past happenings between the parties is not consonant with the idea of indicating in the pleadings whether the action is one at law where a jury is necessary, or the action is one in equity where it is not; for here we get into the realm of legal theory. The pleadings, therefore, should serve the function only of giving a foretaste of the respective stories of the parties. They should not be forced to the duty of setting up sign posts indicating the form of trial and thus forcing the parties into definite legal theories. No question need be raised as to the form of trial until that stage of the proceedings is about to be reached, namely, after the pleadings are closed. Moreover, it need not be raised even then unless the parties so desire. A simple plan of waiver of the right by not claiming it in time, will take care of the cases where the parties are indifferent as to the form of trial;<sup>5</sup> and they will be so indifferent in a surprisingly large number of cases if no procedural advantage such as delay is to be obtained.<sup>6</sup> When raised, the point

<sup>3</sup>See the writer's articles, *History, System and Functions of Pleading*, 11 Va. L. R. 516, and *The Union of Law and Equity*, 25 Col. L. R. 1, for a fuller development of the historical background.

<sup>4</sup>First Report of Commissioners on Practice and Pleadings, N. Y. 1848, sec. 118, note, at pp. 137-147; also *ibid.* sec. 62, note at pp. 67-87, and elsewhere, *passim*. See Clark, *The Complaint in Code Pleading*, 35 Yale L. J. 259, and articles in note 3, *supra*.

<sup>5</sup>Under the original New York code, as well as under those following it, a jury trial is waived by actually going to trial to the court on a jury issue. A simpler and more convenient method is a provision requiring an affirmative claim in writing of a jury before the case is assigned for trial, as, within a certain time after the pleadings are closed. See *Ariz. R. S.*, 1913, sec. 508; *Conn. G. S.*, 1918, sec. 5752 *infra* note 7; *Mass. Gen. L.*, 1921, sec. 60; *Eng. Jud. Act, Rules*, 0.36, r. 2, 6. Substantially the same result is reached in California, Nevada, New Mexico, Utah, Washington, and Wyoming, and in Hamilton and Cuyahoga Counties, Ohio. The statutes will be discussed more at length in a book on Code Pleading, now in preparation by the writer, to be published by the West Publishing Company, St. Paul.

<sup>6</sup>This seems to be the situation in Connecticut, and, as the writer is informed, in California, and very probably in other of the code jurisdictions. In the former state the words "jury cases" and "court cases" have superseded the former "law cases" and "equity cases." See note 7, *infra*; *cf.* as to New York, 27 Abb. N. C. (N. Y.) 101 n.

must be decided by the nature of the issues raised, the test being to determine what tribunal under the old system was the one actually to try the questions at issue. This convenient and direct system is required by certain codes<sup>7</sup> and is followed in some of the most successful of the code reform states.<sup>8</sup>

Does this do violence to the constitutional requirement? It is difficult to see in what way it does. That requirement was obviously intended to protect the people from arbitrary and bureaucratic rule, not to secure quicker and more efficient justice. It is a safety valve and not a brake. It needs to be and is applied broadly and not by rule of thumb.<sup>9</sup> Further the division of code cases into "law cases" and "equity cases" gives no rule of thumb, but changes the wording of the question while complicating the pleadings. The old distinctions are to be resurrected and fought over by the lawyers to decide narrow differences in wording of the pleadings, all for fear that (a) one party will want a jury trial, (b) the other party will not, and (c) the court cannot decide fairly between them. The cost is too great; the guarantee of success, or greater success, by the cumbersome method is too small. We can see in the states following the other method indicated above, a gain in simpler pleading methods; we cannot see a destruction of the constitutional rights of the people.<sup>10</sup>

Our conclusion is, therefore, that while the constitutional provision

---

<sup>7</sup>"The following-named classes of cases shall be entered in the docket as jury cases upon the written request of either party made to the clerk within thirty days after the return day, to wit: \* \* \* [certain appeals from probate and] civil actions involving such an issue of fact as, prior to January 1, 1880 [the date of the code], would not present a question properly cognizable in equity." Conn. G. S., sec. 5752. A jury case may also be claimed to the jury within ten days after an issue of fact is joined. "All matters which, prior to January 1, 1880, were within the jurisdiction of a court of equity, whether directly or as incident to other matters before it, unless otherwise ordered, shall be heard and decided by the court without a jury, in the manner theretofore practiced in courts of equity." Conn. Rules under Prac. Act, sec. 175, Prac. Bk. (1922) 282. For similar provisions, see Indiana, Burns Ann. Stat. 1914, sec. 418; Kentucky, Carroll's Codes 1919, secs. 6, 11, 12. The same results are achieved under the New Mexico, Arkansas and other statutes specially noted in note 14, *infra*.

<sup>8</sup>See, for example, *Angus v. Craven*, 130 Cal. 691 (1901); *Roy v. Moore*, 85 Conn. 159 (1912); *Back v. People's National Fire Ins. Co.*, 97 Conn. 336 (1922); *Bisnovich v. British Am. Assurance Co.*, 100 Conn. 240 (1924); *Rich v. Fry*, 146 N. E. (Ind.) 393 (1925); *Martin v. Turnbaugh*, 153 Mo. 172 (1899); *Sternberger v. McGovern*, 56 N. Y. 12, 21 (1874); *Leonard v. Rogan*, 20 Wis. 540 (1866).

<sup>9</sup>See A. W. Scott, *op. cit.*, p. 73, 74, of *Fundamentals of Procedure*; and *cf.* *McKay v. Railway Co.*, 75 Conn. 608 (1903), holding constitutional the statute cited in notes 5, 7, *supra*, for waiver of jury trial; 34 Yale L. J. 192, n. 5; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 205-217 (1848); *Gen'l Investment Co. v. I. R. T. Co.*, 235 N. Y. 733 (1923).

<sup>10</sup>Compare the writer's comments in 32 Yale L. J. 707 and 34 Yale L. J. 879, 884, 885; *Cook, Equitable Defenses*, 32 *ibid.* 645. The constitutionality of the method was settled by *Phillips v. Gorham*, 17 N. Y. 270 (1858). See also *Wright v. Wright*, 54 N. Y. 437, 443 (1873) and 25 Col. L. R. 1.

does preserve old forms of procedure, it does so only for the method of trial, and then, too, only when an issue is raised upon it; it need not and should not interfere with the simple direct statements of the parties which should constitute the pleadings.

The second problem, namely, whether the codes did not extend the jury trial provision beyond the constitutional right and thus make the problem one more of statutory than constitutional construction, deserves rather careful consideration in view of certain recent decisions referred to hereinafter. The problem arises because most of the codes attempt specifically to define the issues which must be tried by a jury unless it is waived.<sup>11</sup> In the original New York Code the matter is covered in a chapter entitled "Issues and the Mode of Trial." In Section 203 thereof, issues were defined as follows: "Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other." After defining *issues* of law and *issues* of fact and how they may arise, and *trial*, the code in Section 208 provided: "Whenever, in an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury, unless a jury trial be waived, as provided in Section 221, or a reference be ordered as provided in Sections 225 and 226." The next section provided that every other issue was triable to the court which, however, might order the whole issue or any specific question of fact involved therein, to be tried by a jury or by reference to a referee.<sup>12</sup> Section 208 went through some minor modifications until it reached the modern form in the Throop revision of 1876 and 1877, where jury trial is required unless waived or a reference directed upon an issue of fact "in each of the following actions:"

- "1. An action in which the complaint demands judgment for a sum of money only.
2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel."<sup>13</sup>

<sup>11</sup>Statutes often prescribe that specific issues (e. g. certain appeals from probate as in note 7, *supra*, and cf. note 17, *infra*) shall be triable to the jury. The intent of such statutes is obvious and they do not raise the problem stated in the text.

<sup>12</sup>First Report, N. Y. Com'rs on Prac. & Pleadings, N. Y. 1848, secs. 203-209; N. Y. L. 1848, ch. 379, secs. 203-209. Secs. 225, 226 deal with trials by referees, the first providing for such trial by consent, and the second for such trial in some other cases as where a long account must be taken.

<sup>13</sup>N. Y. C. P. A. sec. 425. N. Y. L. 1848, ch. 379, sec. 208, became sec. 253 of L. 1849, ch. 438; in L. 1852, ch. 392, sec. 253 it was amended to include an action "for a divorce from the marriage contract on the ground of adultery;" in L. 1876, ch. 448, sec. 968, it reached its present form except that "1" read: "An action to recover a sum of money only," this being amended to the form given in the text by L. 1877, ch. 416, sec. 217, amending C. C. P. 968. The divorce provision went to C. C. P., sec. 1757, now C. P. A., sec. 1149.

The New York provision was the model for most of the code provisions, most of which follow very closely the language of the original code of 1848.<sup>14</sup> No specific provision is made in New York for the trial of equitable defenses.<sup>15</sup> In some of the code states and particularly those where law and equity are not united and in some of the so-called common law states the statutes are specific, usually to the effect that the issues raised by equitable defenses shall be triable to the court.<sup>16</sup> The question whether the equitable defense raises a different problem is considered later.

It is clear that in these code provisions the codifiers, following their general method of stating exact rules rather than principles of guidance for the judges, were intending at least to include the cases where jury trial was preserved by the Constitution. Beyond this their intent is not clear. In their notes to the code they show that they contemplated an extension of jury trials to cases not required as a constitutional right. But whether these provisions constituted that extension, or whether it was to be made by other special statutes does not appear.<sup>17</sup>

<sup>14</sup>"In actions for the recovery of specific real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury," unless there is a waiver or a reference, Cal. C. C. P. 1923, sec. 592. See also Colo. R. S. Code C. P. 1921, sec. 191; Idaho Comp. Sts. 1919, sec. 6837; Iowa Code 1924 secs. 10940, 11429; Kans. Rev. Sts. 1923, ch. 60, par. 2903; Minn. Gen. Sts. 1923, sec. 9288; Mo. Rev. Sts. 1919, sec. 1398; Mont. Rev. Code 1921, sec. 9327; Neb. Comp. Sts. 1922, sec. 8787; Nev. Rev. Laws, 1912, sec. 5199; N. C. Consol. Sts. 1919, sec. 556; N. D. Comp. Laws 1913, sec. 7608; Ohio Gen. Code 1926, sec. 11379 Okla. Comp. Sts. 1921, sec. 532; S. C. Code of Laws 1922, sec. 533; S. D. Rev. Code 1919, sec. 2492; Utah, Comp. L. 1917, sec. 6781; Wash. Comp. Sts. 1922, sec. 314; Wyo. Comp. Sts. 1920, sec. 5723. In New Mexico the original New York provision is given but is limited to cases "where the right of trial by jury existed at common law," N. Mex. Stat. 1915, sec. 4193. In Arkansas the usual provision appears, Ark. St. 1921, sec. 1266, but is subject to *ibid.* sec. 1045, giving a right to have any issue heretofore exclusively cognizable in chancery tried as an equitable proceeding. In Arizona all issues, legal or equitable, go to the jury, Ariz. R. S. 1913, sec. 508. For Connecticut, Indiana, and Kentucky, see note 7, *supra*; for Wisconsin, note 16, *infra*.

<sup>15</sup>Equitable defenses were not mentioned in the original code of 1848, nor were counterclaims. They were both specifically referred to in the amendment of 1852. L. 1852, ch. 392, sec. 150, though no reference is made thereto in the jury trial statute. That such defenses were available before the amendment, see *Haire v. Baxter*, 5 N. Y. 357 (1851); *Cook, Eq. Defenses*, 32 Yale L. J. 645.

<sup>16</sup>In the Wisconsin code, the following is added to the original New York provision: "except that all issues arising on equitable defenses or counterclaims are triable by the court." Wis. St. 1921, sec. 2843. In the four code states where equity and law are not blended express provision is made for the trial of "equitable issues" as formerly. See Arkansas, *supra*, note 14; Iowa, Code 1924, sec. 10947; Ky., note 7, *supra*; Oregon Code 1920, sec. 390. Compare U. S. Comp. Sts. 1916, sec. 1251b; *Plews v. Burrage*, 274 Fed. 881 (1921), and remarks of Cardozo, J., on this statute in *Susquehanna Steamship Co. v. Andersen & Co.*, 239 N. Y. 285, 295 (1925).

<sup>17</sup>See the remarks of the Code Commissioners in their First Report, 1848, sec. 208, n., also p. 179-181. Among issues made specifically triable to the jury in

On the surface the statute seems exact in meaning and capable of easy application. Apparently the court has only to see if a case is within the express language of the statute and the result then follows. But words are not the exact things we sometimes think they are and they can be made to bear various meanings.<sup>18</sup> We need to look at the background and purpose of the statute in order to attach an intelligible not to say workable and convenient usage. Thus A sues the B Insurance Company, claiming his policy was wrongly worded by mistake and asking for the recovery of the face of the policy according to the true agreement between the parties. Is that an action for money only?<sup>19</sup> After all that is what the plaintiff wants. But we think of our history and say, that is an action for reformation and recovery, formerly brought to a court of equity and therefore triable to the court.<sup>20</sup> So it has happened in actual experience that this statute has been interpreted in the light of its history as merely declaratory of the formerly prevailing practice. The result seems eminently sound. It respects the general intent of the codifiers and gives an understandable test, in place of what must otherwise be the greatest confusion. Thus the New York Court of Appeals interpreted the reference to "nuisance" in the statute as meaning a reference to the old common law action of nuisance and hence as not applying to an action to enjoin a nuisance.<sup>21</sup> Similar views are

---

New York are those of adultery in divorce, action to annul marriage, action by the attorney general against a usurper of an office or franchise, mandamus, partition, C. P. A., sec. 1149, 1142, 1208, 1221, 1333, 1021, action to annul a corporation, Gen. Corp. L. sec. 133, etc. Cf. also Insurance Law, sec. 208; Public Lands Law, sec. 139; C. P. A. sec. 1428 (summary proceedings against a tenant).

<sup>18</sup>Cf. discussion of the nature of *facts* in the writer's article, *The Complaint in Code Pleading*, 35 Yale L. J. 259.

<sup>19</sup>"The judgment actually rendered is merely a legal judgment for the recovery of debt or damages, the equitable relief of a reformation not being actually decreed, but being assumed; the purely legal relief is awarded exactly as though the prior auxiliary equitable relief had been in terms granted." Pomeroy, *Equity Jurisprudence*, 4th ed., sec. 357, n. 2. Cf. *Maier v. Hibernia Ins. Co.*, 67 N. Y. 283, 291 (1876).

<sup>20</sup>See *Bidwell v. Astor Ins. Co.*, 16 N. Y. 263, 267 (1857); *Phillips v. Gorham*, 17 N. Y. 270 (1858); *Caswell v. West*, 3 Thomp. & C. (N.Y.) 383 (1874); *Back v. Ins. Co.*, note 8, *supra*.

<sup>21</sup>*Cogswell v. N.Y., N.H. & H.R.R.*, 105 N.Y. 319 (1887); *Lynch v. Metropolitan Ry.*, 129 N. Y. 274 (1891); *Shepard v. Manhattan Ry.*, 131 N. Y. 215 (1892); *Livingston v. Manhattan Ry.*, 131 N. Y. 600 (1892); *Dean v. Berm.*, 69 Hun. (N.Y.) 519 (1893), *affd.* 142 N. Y. 684; *Haight v. Littlefield*, 71 Hun. (N.Y.) 285 (1893); *Goldschmidt v. N. Y. Steam Co.*, 7 App. Div. (N.Y.) 317 (1896); *Page v. Herkimer Lumber Co.*, 109 App. Div. (N.Y.) 391 (1905); *Tucker v. Edison Electric Ill. Co.*, 100 App. Div. (N.Y.) 407 (1905), *affd.* 184 N. Y. 548 (1906); *Miller v. Edison Elec. Ill. Co.*, 184 N. Y. 17, 20 (1906) (the action may be retained to award damages even if the injunction is not granted); *ibid.* 78 App. Div. (N.Y.) 390 (1903); *Hunter v. Manhattan Ry. Co.*, 141 N. Y. 281 (1894); *Garth Estates v. Bronx Parking Com.*, 177 App. Div. (N.Y.) 6 (1917) (action to enjoin entry and waste with claim of mistake in a deed): *contra*; *Lefrois v. Monroe*, 88 Hun.

applied to actions for money damages, but involving also accounting, cancellation, foreclosure, and so on.<sup>22</sup> So an action to recover the possession of specific real property—or the action of ejectment as defined in the New York Code<sup>23</sup>—might be interpreted to include a claim for specific performance, since the plaintiff's real objective there is to get the land; but it is interpreted to mean the issues triable in the old action of ejectment.<sup>24</sup> Such interpretation of the statute is general throughout the code jurisdictions.<sup>25</sup> Where there is apparent dissent it usually raises the whole issue how far legal and equitable claims may be made in a single action rather than the point of form

---

(N. Y.) 109 (1895), and *cf.* *Hudson v. Caryl*, 44 N. Y. 553 (1871), and *McNulty v. Mt. Morris Elec. Lt. Co.*, 172 N. Y. 410 (1902), the latter case by a divided court holding that the *defendant* may claim a jury trial where the injunction will not issue. See comment, *Trial by Jury in Suits to Enjoin Nuisances*, 25 Col. L. R. 641.

<sup>22</sup>There is no right to a jury trial on a creditor's bill, asking and getting judgment for a sum of money only. *Murtha v. Curley*, 90 N. Y. 372 (1882); *Bell v. Merri-field*, 109 N. Y. 207 (1888); *Bailey v. Hornthal*, 154 N. Y. 648 (1898). Nor in an action for an accounting. *Pendergast v. Greenfield*, 127 N. Y. 23 (1891); *Weldon v. Brown*, 89 App. Div. (N. Y.) 586 (1904). Nor in foreclosure proceedings with claim of a money judgment. *Matter of Hamilton Park Co.*, 1 App. Div. (N. Y.) 375 (1896). Nor in an "equitable action though money damages are granted, cases in note 21, *supra* (*cf.* especially *Miller v. Edison Elec. Ill. Co.*); *DiMenna v. Cooper & Evans Co.*, 220 N. Y. 391 (1917) (placed on the ground of waiver); *Getty v. Hudson River Co.*, 6 How. Prac. 269, 271 (1857); *MacNaughton v. Osgood*, 114 N. Y. 574 (1889); *Kilbourne v. Supervisors*, 137 N. Y. 170 (1893); *Dykman v. U. S. Life Ins. Co.*, 176 N. Y. 299 (1903); *Croker v. N. Y. Trust Co.*, 123 Misc. (N. Y.) 460 (1924); *contra* where the claim for equitable relief is not made out; *Glenn v. Lancaster*, 109 N. Y. 641 (1888). So in *Moss v. Burnham*, 50 App. Div. (N. Y.) 301 (1900) suit to set aside fraudulent release and collect money, and *Bidwell v. Astor Ins. Co.*, 16 N. Y. 263 (1857), and *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143 (1901) suit to reform insurance policy and recover on it, there was no right to a jury trial. The plaintiff by joining legal and equitable claims may waive his jury right. *Davison v. Associates of Jersey Co.*, 71 N. Y. 333 (1877), but this should not be the case where they are upon distinct and separate causes of action. *Magnolia Metal Co. v. Drew*, 68 App. Div. (N. Y.) 47 (1902).

<sup>23</sup>N. Y. C. P. A. sec. 7.

<sup>24</sup>See *R. M. Hutchins, Equitable Ejectment*, 26 Col. L. R. 346. *cf.* *Henderson v. N. Y. Cent. Ry. Co.*, 78 N. Y. 423 (1879); *Baron v. Korn*, 127 N. Y. 224 (1891); *Carroll v. Bullock*, 207 N. Y. 567 (1913); *Klapp v. Dealey*, 213 App. Div. (N. Y.) 523 (1925). The real dispute in *City of Syracuse v. Hogan*, 234 N. Y. 457 (1923) between the majority and the minority seems to have been whether equity would have had jurisdiction of the case. See criticism of the case in 32 *Yale L. J.* 707 and 9 *CORNELL LAW QUARTERLY* 73, *contra*, 23 Col. L. R. 590.

<sup>25</sup>See full discussion in *Kenny v. McKenzie*, 25 S. D. 485, 49 L. R. A. (N. S.) 775, 782 (1910); see also *Brady v. Yost*, 6 Idaho, 273, 283 (1898); *Houston v. Goemann*, 99 Kan. 438 (1917); *Berkey v. Judd*, 14 Minn. 394 (1869). Cases are collected in 35 C. J. 159, *et seq.* Cases on equitable defenses are cited hereinafter, notes 34, 35, *infra*. General statements that the statute alone determines the form of trial are found in some of the cases, *Genesaulius v. Pettit*, 46 Ohio St. 27 (1888); *Word v. Nakdemen*, 178 Pac. (Okla.) 257 (1918), but the courts seem to return to the test whether the case is "equitable" or "legal," *Taylor v. Brown*, 92 Ohio St. 287 (1915); *Katz v. Finance Co.*, 112 Ohio St. 24 (1925); *McCoy v. McCoy*, 30 Okla. 379 (1911); *Sierzek v. Smith*, 206 Pac. (Okla.) 611 (1921).

of trial alone.<sup>26</sup> How far the construction may seem settled is shown by the fact that in 1891 an act was passed in New York giving a jury trial on all questions of value of property or damages arising on the pleadings, and while this was thought to extend greatly the jury trial right, the Court of Appeals held otherwise.<sup>27</sup>

Should there be any distinction drawn between the more general language of most codes giving the jury trial right in actions for the recovery of money only, and the more specific language of the later New York code giving it in "an action in which the complaint demands judgment for a sum of money only"? If so, this is a rather complete change from the general theory of the New York code. The subordinate nature of the demand for judgment is settled in New York as elsewhere under the code; the demand has little function to perform except in the case of a judgment by default.<sup>28</sup> Is it now suddenly to be raised to an important position determining the form of trial? If so, not the nature of the case but the plaintiff's whim will determine the nature of the trial. As Mr. Pomeroy in a passage previously quoted points out, the real nature of a judgment of recovery in an action for reformation is a judgment for money.<sup>29</sup> If the plaintiff adds to his demand the now purely formal claim of reformation—which will not *actually* be had—does that prevent a jury trial? Some light is cast upon this subject by the notes of Mr. Montgomery H. Throop himself as to the legislative history of the code which bears his name.<sup>30</sup> It seems that he and his associates determined to make the demand for judgment much more important than formerly in order that it would show the cause to be either legal or equitable and thus clear up the question of form of trial; and to this end many provisions were inserted, including a demurrer to the demand for judgment as not supported by the facts alleged.<sup>31</sup> But the "absurd clamor" was raised that this "effected substantially a restoration of the old line of partition between actions at law and in equity, with all

<sup>26</sup>For discussion of the problem of union of law and equity, see Clark, *The Union of Law and Equity*, 25 Col. L. R. 1. Compare such New York cases as *Phillips v. Gorham*, 17 N. Y. 270 (1858) with *Jackson v. Strong*, 222 N. Y. 149 (1917).

<sup>27</sup>*Shepard v. Manhattan Ry. Co.*, 131 N. Y. 215 (1892) construing L. 1891, ch. 208, which was amended, by striking out the provisions in question, by L. 1892, ch. 188; C. P. A. sec. 429; C. C. P. sec. 970. For the other view, see 27 Abb. N. C. (N. Y.) 101.

<sup>28</sup>See cases collected 35 Yale L. J. 259, 285-290; 25 Col. L. R. 1.

<sup>29</sup>See note 19, *supra*.

<sup>30</sup>Through the various vicissitudes and dissensions among the commissioners who revised the code, Mr. Throop alone seems to have remained steadfast and held his position. He may properly be considered the author of the code and qualified to explain what was intended. See his introduction to C. C. P. (ed. 1880) p. VIII-X.

<sup>31</sup>See Throop's notes to C. C. P. (1880) pp. 401-404, 204-5, 210, 1, referring to sec. 484-6, 488-9, 495-6, 509, 966-970, 971, 974 of L. 1876, ch. 488.



the former consequence of a mistake of jurisdiction, thus rendering ineffectual the labors of the legal reformers during a third of a century." And so vehemently was the charge pressed and so extended the belief therein that the commissioners feared that it put their whole code of 1876 into jeopardy. "For this reason, upon their recommendation, the legislature, by the amendatory act of 1877, expunged these provisions; thus leaving the law upon the subjects which they covered in its former unsatisfactory condition."<sup>32</sup> While the particular change in question did not appear until the act of 1877, it seems probable that it was a part of the scheme which was abandoned at that time. Apparently the view of Mr. Throop that the law was left in its former state was always accepted.<sup>33</sup>

Suppose now the matter "formerly cognizable in equity" is injected into the case by the defendant as a defense and not by the plaintiff. Is the situation changed? It is believed that it is not, and our interpretation of the statute should be made as before, thus giving no right to a jury trial of the equitable defense. The cases from the general code jurisdictions supporting this are many,<sup>34</sup> and there is but a slight dissent,<sup>35</sup> now reinforced by New York. In view of the recent decision in *Susquehanna Steamship Co. v. Andersen & Co.*,<sup>36</sup> the question may perhaps be considered reopened.

We may be asked at the outset why the minority decision sending

<sup>32</sup>*Ibid.* The act of 1876 was actually in force only three weeks. *Ibid.* p. XII.

<sup>33</sup>See cases in notes 21, 22, 24 *supra*, which do not refer to the act of 1877 as making any change in the previous rule. "The prayer for judgment is not decisive and does not control the nature of the action." *City of Syracuse v. Hogan*, 234 N. Y. 457, 461 (1923) citing cases.

<sup>34</sup>*Swasey v. Adair*, 88 Calif. 179 (1891) citing cases; see 13 Calif. L. R. 345, citing cases and with full discussion: *Weir v. Welch*, 71 Colo. 66, (1922); *Penninger Lateral Co. v. Clark*, 22 Idaho 397 (1912); *Morris v. Merritt*, 52 Iowa 496 (1879); *Queen Ins. Co. v. Marks*, 204 Ky. 662, (1924), with note 25 Col. L. R. 378; *Gallagher v. Basey*, 1 Mont. 457 (1872) *affd.* 20 Wall. (U. S.) 670 (1874); *Simmons v. Baker*, 109 Neb. 853 (1923); *Treadway v. Wilder*, 12 Nev. 108 (1877); *Arnett v. Smith*, 11 N. D. 55 (1902); *Gill v. Pelkey*, 54 Ohio St. 348 (1896) (suggesting, however, an undefined distinction between a defense and a cross-action); *Gantz v. Gease*, 82 Ohio St. 34 (1872); *Greenville v. Ormond*, 44 S. C. 116 (1895); *Kenny v. McKenzie*, *supra*, note 25; *Park v. Wilkinson*, 21 Utah, 279 (1900); *Peterson v. Phila. Mut. & Trust Co.*, 33 Wash. 464 (1903); *Gunn v. Madigan*, 28 Wis. 158 (1871). See also statutes, note 16, *supra*. The note in *Ann. Cas.* 1913 D, 167, 168 (to *Nolan v. Pac. Warehouse Co.*, 67 Wash. 173 (1913)) seems somewhat misleading.

<sup>35</sup>*King v. International Lumber Co.*, 156 Minn. 494, (1923), (reply alleging that a release was procured by fraud presents a legal defense); *Citizens Trust v. Goings*, 288 Mo. 505, 511, (1921) (estoppel); but an answer which pleads equitable matter and asks for affirmative relief is triable to the court, *Wolf v. Hartford Fire Ins. Co.*, 269 S. W. (Mo.) 701, 704 (1925); *Confrey v. Pratt*, 248 Mo. 576 (1913) (claim of cancellation is sufficient); *Hauser v. Murray*, 256 Mo. 58 (1913) (no jury trial even though no prayer for relief in the answer).

<sup>36</sup>239 N. Y. 285 (1925), *Hiscock. C. J.*, *McLaughlin and Andrews, J. J.*, dissenting, without opinion.

the case to the jury is objectionable, why it may not in fact have the effect of making a closer union of law and equity by making the case "all law," as at least one commentator has thought.<sup>37</sup> The answer is that indicated above to the idea that the action must be either one "at law" or "in equity." It is looking for a signpost—and perverting the pleadings to their unutterable confusion while so doing—where there is none. Specifically it is an attempt to make the important jury trial right turn upon a distinction which for practical purposes does not exist, that between an equitable defense and an equitable counterclaim. The resulting confusion is increased by the general reluctance of judges to send cases to a jury unless compelled thereto, in view both of the crowded conditions of jury dockets<sup>38</sup> and settled views that juries are not fitted to try certain classes of cases.<sup>39</sup> If that result is avoided by merely calling the defendant's pleading a counterclaim, that apparently seems to the ordinary judge a small price to pay.<sup>39a</sup>

To explain just what is meant by the statement that the distinction between equitable defenses and equitable counterclaims does not exist for practical purposes, that is, *so far as to be readily usable by the pleader*, we need to go back to the history of the equitable defense.<sup>40</sup> This term is applied to matter which really was not a defense in equity but was the subject of affirmative action there, with the object of preventing the opposing party from taking advantage of a right which he apparently had. The matter is typically and almost exclusively fraud or mistake in some agreement which is the foundation of the plaintiff's claim, and it gave basis for the equitable remedies of rescission, reformation, cancellation, and, often, injunction of a pending action at law.<sup>41</sup> It might be set up in an equitable action,

<sup>37</sup>25 Col. L. R. 630, which seems inconsistent with other views stated in the same review. 25 *ibid.* 641; 337, 339, n. 8; 378. Cf. 13 Calif. L. R. 345.

<sup>38</sup>Evans v. National Broadway Bank, 88 App. Div. 549 (1903).

<sup>39</sup>Cf. Hinton, Cases on Code Pleading, 2d ed., 609, 616; 18 Mich. L. R. 717, 732; Cook, 32 Yale L. J. 651, n.; Williston, Contracts, 2824. The Susquehanna decision indicates a difficulty here in view of the equity rule of requiring proof of mistake "of the clearest and most satisfactory character." The attempt to apply this rule to a jury trial is well criticised in 11 CORNELL LAW QUARTERLY 396.

<sup>39a</sup>For examples of this, see note 56 *infra*; Straus v. Am. Credit Ind. Co., 203 App. Div. (N. Y.) 361 (1922).

<sup>40</sup>This is excellently summarized in a recent note in this QUARTERLY. 11 CORNELL LAW QUARTERLY 396 criticizing the Susquehanna decision. See also Hinton, Equitable Defenses under Modern Codes, 18 Mich. L. R. 717; Cook, Equitable Defenses, 32 Yale L. J. 645.

<sup>41</sup>Estoppel *in pais* to an action of ejectment had very largely worked over into the law as a purely legal defense before the code reform. Kirk v. Hamilton, 102 U. S. 68 (1880); note 49 L. R. A. (N. S.) 775; Hinton, 18 Mich. L. R. 717, 721. This may have been true to a limited extent of fraud and mistake in a few jurisdictions. As to a distinction between fraud in the factum and fraud in the inducement, see George v. Tate, 102 U. S. 564 (1880).

but even there it was normally done, not by answer but by cross-bill. Its purpose now is defensive, its origin is equitable; which facts give its present name used in statutes and cases whatever justification it may have.<sup>42</sup> In view of its origin the logical conclusion might well be that it is not a defense but a counterclaim under modern pleading. Perhaps if we followed our logic and always so ruled, the result might be simpler—such at least seems to be the view of Professor Hinton and others.<sup>43</sup> The difficulty is that the only reason why we need to use the mystic formula of counterclaim rather than defense is an historical one and hence one unreal to most pleaders. B objects that A is not entitled to a judgment of possession of Blackacre because there was a mistake in A's deed. B is actually defending and a simple system of telling his story in his pleading would lead him to say so. Shall we penalize him because he does the obvious and direct and not the circuitous and complicated? Hence the more usual view,—advocated by Pomeroy, Cook, and others—is that it is truly a defense and may be set up as such.<sup>44</sup> Analytically considered this seems indisputable. B sets up the matter *because he is being sued and to prevent a judgment against him*. But again shall we force him in his pleading to be strictly analytical? If he chooses to put up his story as an affirmative claim, he has historical precedents behind him. And more especially he may wish to use the matter both defensively and to secure some affirmative relief. Thus he may desire to have the written instrument upon which the plaintiff relies delivered up and cancelled; or he may desire to have other parties, perhaps the original parties to the agreement cited in, and a settlement of the controversy as against every one had;<sup>45</sup> or he may feel just uncomfortable as to whether a defense alone is sufficient to protect him and whether he should not ask for something more, very likely useless and unneces-

---

<sup>42</sup>See criticism of the term by Hinton, *op. cit.*, n. 40, *supra*. That an *affirmative* action was necessary in equity, see *ibid.*; Beck v. Beck, 43 N. J. Eq. 39 (1887); Ford v. Douglas, 58 How. (N. Y.) 143 (1846). It might, however, operate as a defense to an action of specific performance. Ramsbottom v. Gooden, 1 Ves. & B. (Eng.) 165 (1812) and other authorities cited in 2 Cook's Cases on Equity 768.

<sup>43</sup>Hinton, *op. cit.*

<sup>44</sup>Cook, *op. cit.*; 11 CORNELL LAW QUARTERLY 396.

<sup>45</sup>In Cray v. Goodman, 12 N. Y. 266 (1855) the defendant was allowed to show as a defense mistake in a deed given by plaintiff's grantors to defendant's landlord. This is criticized by Professor Hinton, 18 Mich. L. R. 726, 732, because of the lack of the parties to the original deed. See also Breitung v. Packard, 260 Fed. 895 (1919); Cramer v. Benton, 60 Barb. (N. Y.) 216 (1871); Hicks v. Sheppard, 4 Lans. (N. Y.) 216 (1871); Webster v. Bond, 9 Hun. (N. Y.) 437 (1876); Malone v. Romano, 95 N. J. Eq. 291, (1923). But unless the parties desire the additional protection of having the other parties cited in, there seems no reason why the court should object; the matter is clearly defensive, since it shows the plaintiff is not entitled to recover the possession in question.

sary, such as an actual reformation.<sup>46</sup> Why should we attach drastic results to a decision on the pleader's part either way? We want his story and actually we have it, whether he has christened it as we think he ought or not.<sup>47</sup>

Since it thus seems practically impossible to rule arbitrarily that such matter is always a defense or is always a counterclaim, many courts try to take a middle ground that certain matter is a defense and certain matter a counterclaim.<sup>48</sup> This is probably the most confusing view of all since it assumes a nonexistent distinction in the kind of allegations made. Chief Justice Winslow states this view that

"Facts which if true simply defeat the plaintiff's action may be set up as a defense alone, but facts which call for affirmative relief in favor of the defendant before the plaintiff's action can be defeated must be set up by counterclaim."<sup>49</sup>

But this begs the whole question since we wish to know which facts simply defeat the plaintiff's action and which call for affirmative relief as a prerequisite. Under the historical view the situation is always the second; under the analytical always the first, even though the defendant wants additional relief also.<sup>50</sup> If this view is followed the situation is especially unfair to the pleader for he is supposed and required to know a distinction which cannot be expressed in a working rule but exists only when the judge declares that it exists in a case before him.

The conclusion, therefore, it is submitted, is that the jury trial right cannot be made to turn upon anything so illusory as a supposed distinction between a defense and a counterclaim; it should be made to turn upon the fairly definite inquiry as to the nature of the issue raised and where formerly it was triable.

Judge Cardozo's decision in the *Susquehanna* case indicates the difficulties of attempting to base the jury trial right upon this illusory distinction. The first part of the opinion is a clear argument for the simple direct pleading of such matter—here mistake in the formation of a contract—as a defense, that is, the analytical view set forth

<sup>46</sup>In the *Susquehanna* case the defendant asked for judgment dismissing the complaint and for "such other and further relief in the premises as to the court may seem just." The court said this was sufficient pleading of a counterclaim if one were necessary. See p. 290 of 239 N. Y.

<sup>47</sup>In some states a reply is only necessary if it is a counterclaim, but as Cardozo, J., shows, p. 290, 291 of 239 N. Y., the defendant cannot by his misdescription set a trap for his adversary. In other words, the trial court will protect the plaintiff where necessary, and no arbitrary distinction between counterclaim and defense is needed for such protection.

<sup>48</sup>See cases of this sort referred to by Hinton, *op. cit.*

<sup>49</sup>*Chicago & N. W. Ry. Co. v. McKeigue*, 126 Wis. 574 (1906).

<sup>50</sup>This last is well criticised by Hinton, 18 Mich. L. R. 733; and see 11 CORNELL LAW QUARTERLY 396.

above. But the opinion goes on to state that being a defense by its nature, it must be tried to the jury.<sup>51</sup> It is also said that simply calling a defense a counterclaim does not change it from being a defense. But will the learned judge feel like being absolutely arbitrary against a defendant who believes he has a counterclaim when the matter is also defensive? Under the *Susquehanna* decision, are these all defenses merely,—fraud or mistake in a contract of insurance, the same in a deed of realty, the same where the parties to the deed were the predecessors in interest of the present parties and hence not before the court,<sup>52</sup> and especially where the defendant wishes them brought in, fraud in procuring a negotiable note, the same where the defendant wishes to have it delivered up and cancelled, the same where the note is one of a series, all of which should be cancelled, or the analogous situation of coupons on a bond? If the Court of Appeals can unhesitatingly call *all* of these "defenses" in spite of the label "counterclaim," a trial judge may well hesitate to do so. Indeed, the *Susquehanna* decision itself indicates a limitation:—

"We have held that even the label of a counterclaim will not change the mode of trial at the instance of a defendant, if what is described as a counterclaim is also a defense unless the situation is one in which affirmative relief through a formal judgment of reformation is essential for complete protection. That situation may arise where an instrument is capable of being used thereafter to the prejudice of the signer, for the verdict of a jury, if the possibility exists that it has been based on more grounds than one, is an uncertain basis for a plea of *res adjudicata*. In the absence, however, of a counterclaim, all defenses, legal and equitable, stand upon a parity."<sup>53</sup>

But that, it is submitted, is no better a test than Judge Winslow's. When is a formal judgment of reformation essential for complete protection? The cases give no answer and we are back at the same confusion as before, looking for some fundamental distinction in matter which at the same time may have defensive and offensive

---

<sup>51</sup>The actual decision was that a new trial should be had for failure to admit the evidence of mistake. The case had been tried before a jury. The court's discussion of the form of trial may be due to the very evident doubt shown by counsel, one of them former Governor and Judge Miller. The plaintiff claimed a counterclaim was necessary in order that a court trial might be had; the defendant that it had waived its opportunity to claim such a trial by pleading the defense, but the plaintiff still might claim it. As to this waiver, see note 60, *infra*.

<sup>52</sup>Note 45, *supra*. Under modern procedure where the filing of the judgment in the land records makes good title, actual reformation is not necessary and a judgment simply for the defendant is as good as one which contains various expression of reformation, or even specific performance. See *Pomeroy*, and *Maher v. Hibernia, Ins. Co.*, n. 19, *supra*; *Hayes v. Hayes*, 126 Minn. 389 (1914); evidence of a parol executed gift of land is a good defense to ejectment; 26 Yale L. J. 592.

<sup>53</sup>239 N. Y. 285, 296 (1925).

characteristics. The result is hardly the closer union of law and equity for which supporters of this view had hoped.<sup>54</sup>

It is suggested in the *Susquehanna* decision that the result is made necessary by precedent and practice. On these points the writer, with all deference for the great learning and experience of the distinguished jurist who wrote the opinion, suggests his doubt. The precedents as to the general construction of the statute have been referred to above.<sup>55</sup> Unless the equitable defense is a special case they point the other way. The actual decisions as to the form of trial of equitable defenses are very few in number and are at most conflicting and inconclusive.<sup>56</sup> The practice, it is submitted, indicates that it is by consent of the parties, for if the constitutional or statutory right had been fought over, that contest would have been dis-

<sup>54</sup>See Comment, 25 Col. L. R. 630, cited note 37, *supra*. Judge Cardozo's own opinions do not clearly point the way to a distinction. In *City of Syracuse v. Hogan*, *supra*, n.24, he dissented and said that the court by requiring a jury trial was turning the clock back many years. Cf. also *Di Menna v. Cooper & Evans Co.*, n. 22, *supra*, and *Golde Clothes Shop v. Loew's Buffalo Theatres*, 236 N. Y. 465 (1923) discussed in 9 CORNELL LAW QUARTERLY 467, 468; 24 Col. L. R. 428; 25 *ibid.* 337; 33 Yale L. J. 660. The New York cases generally leave it quite in doubt as to when a formal decree of reformation may be asked for. Cf. *City of N. Y. v. Mathews*, 213 N. Y. 563 (1915) and *Walker v. Am. Cent. Ins. Co.*, 143 N. Y. 167 (1894) with *Born v. Schrenkeisen*, 110 N. Y. 55 (1888) and *Straus v. Am. Credit Ind. Co.*, 203 App. Div. (N. Y.) 361 (1922). Cf. *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283 (1876) where it was said the form of judgment was immaterial. See cases in 56, *infra*.

<sup>55</sup>Notes 21, 22, 24, *supra*.

<sup>56</sup>Of the cases cited the point seems to have been raised in only one. *Bennett v. Edison Elec. Ill. Co.*, 164 N. Y. 131 (1900), decided by a sharply divided court and relying on a single case; (*MacKellar v. Rogers*, 109 N. Y. 468 (1888), which was on another point and is itself doubtful; see n. 60, *infra*); the defense actually seems to have the legal defense of fraud in the factum (see n. 41, *supra*). See *Thomas v. Bronx Realty Co.*, 60 App. Div. (N. Y.) 365 (1901); *Johnson v. Johnson*, 157 App. Div. (N. Y.) 289, 291 (1913) so explaining it. In the other cases the point seems not to have been raised. *Dobson v. Pearce*, 12 N. Y. 156 (1854); *Southard v. Curley*, 134 N. Y. 148 (1892); *Kirschner v. New Home Sewing Mach. Co.*, 135 N. Y. 182 (1892); Other examples of the latter sort may be given. In other cases a trial to the court seems to have been thought necessary. *Cramer v. Benton*, 60 Barb. (N. Y.) 216 (1871); *Cavalli v. Allen*, 57 N. Y. 508, 514 (1874); *Sturm v. Atl. Mt. Ins. Co.*, 38 N. Y. Sup. Ct. 281, 298 (1874), *affd.* 63 N. Y. 77 (1875) holding that the trial of equitable defenses is at the discretion of the judge; *Goss v. Goss & Co.*, 126 App. Div. (N. Y.) 748 (1908); cf. *Warner v. Star Co.*, 162 App. Div. (N. Y.) 458 (1914) and *Pitcher v. Hennessy*, 48 N. Y. 415, 422 (1872) where the head note is misleading. The situation is complicated by the fact that the courts, when they feel that the issue is in equity, simply say a counterclaim is necessary. Of the many cases of this sort, *Straus v. Am. Credit Indem. Co.*, 203 App. Div. (N. Y.) 361 (1922) is a good example; the court distinguishing the *Bennett* case as above, and saying that this was more than a defense, one justice dissenting. This is the way in which the *Susquehanna* decision may be avoided. Cf. *Cohen v. Am. Surety Co.* 129 App. Div. (N. Y.) 166 (1908) with *Rubenstein v. Kadet*, 133 App. Div. (N. Y.) 57 (1909). A trial to the jury has been held not irregular (which indicates a question as to the existence of an absolute requirement for such trial). *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, 292 (1876); cf. *City of N. Y. v. Mathews*, n. 54, *supra*.

closed by the reported decisions. Certainly such a practice, indicating a flexibility in the method of trial, is to be desired, if it is not to be crystallized into an arbitrary and binding rule.<sup>57</sup> The latter, it is to be feared, is what is attempted by the decision.

It is urged further in the decision that the result is necessary by virtue of Sec. 424 of the statute, reading as follows:

"Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereupon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim and demanding the same judgment."<sup>58</sup>

This was not in the original code but dates only from the Throop revision of 1876. It seems not to have been followed in the other code states. In its original form it continued "and each provision of the last four sections applies to such an issue of fact, and to the trial thereof." The sections referred to did not include the jury trial statute but merely certain provisions as to the manner of applying for an order of trial by jury and the order thereon.<sup>59</sup> In form it seems a rather clear declaratory statement of an admitted rule, that the trial of an issue of fact in the counterclaim is the same as if it arose in an action where the counterclaim was the complaint. To read into it, as the court does, a *negative opposite* of more extensive character, namely, that if the defendant interposes a *defense* the form of trial shall be without reference to the defense, but *shall be determined by the complaint alone*, seems a *non-sequitur*. The legislative history of the Throop code, above referred to, is decisive to the contrary, that it was declaratory only, and intended to limit the other provisions—repealed in 1877—which aimed to make the formal demand for judgment controlling of the method of trial.<sup>60</sup>

<sup>57</sup>Since the court may direct an equitable issue to be tried by the jury, jury trial without objection should raise no question. *Maier v. Hibernia Ins. Co.*, n. 56, *supra*, except that on appeal it may be advisory only. *Di Menna v. Cooper & Evans Co.*, n. 22, *supra*; *Carroll v. Bullock*, n. 24, *supra*. Compare the doubt of eminent counsel in the principal case as to the proper practice, n. 51, *supra*. The writer has been informed by competent authority that local practice and belief was contrary to the final holding in *Syracuse v. Hogan*, *supra*, n. 24.

<sup>58</sup>N. Y. C. P. A. sec. 424, from C. C. P. 974; L. 1876, ch. 488, sec. 974, amended by laws 1877, ch. 416, sec. 222.

<sup>59</sup>Of these four sections one was repealed in 1877, and the others appeared as C. C. P., sec. 970-973, now C. P. A. sec. 429, 430, 443. As to the history of sec. 429, see n. 27, *supra*. The heading of C. C. P. sec. 974; "Counterclaim deemed an action within foregoing sections" was changed in C. P. A. sec. 424 to "Counterclaim deemed complaint for trial purposes."

<sup>60</sup>See references given in note 31, *supra*, where Mr. Throop states that this section among others was to guard against "too rigid an application of the new rules thus established." C.C.P. 1880 with Throop's notes, p. 403. Some cases assert that defendant waives his jury right by pleading a legal counterclaim in an

One other issue not raised in the case may be noted, even though the writer believes the answer implied in the decision to be the correct one. Is there a constitutional right to a trial to the court in an "equity case"? Some able courts have argued most strenuously that there was,<sup>61</sup> and lately the United States Supreme Court has termed it "a grave constitutional question."<sup>62</sup> The Montana court ruled that the only way in which a statute thought to extend jury trials to equity cases could be upheld was by holding that while the prescribed issue *must* be sent to the jury, the verdict was only *directory* as under the old equity procedure.<sup>63</sup> It would seem that this is to spell a quite arbitrary distinction out of a small basis in the constitutional language. The result seems an unnecessary blighting of flexible court procedure, and the contrary rule announced in other cases seems decidedly preferable.<sup>64</sup> The New York decisions indicate support for the latter view, though the answer is perhaps more assumed than settled.<sup>65</sup> It is even possible to argue that the jury's finding on the issue of the equitable defense is only advisory, and that the evidence is subject to review on appeal to the Appellate Division.<sup>66</sup> This result is probably to be deplored. Its possibility indicates another difficulty of the arbitrary construction of the jury trial statute made by the court.

In the field of pleading and procedure, the various states as well as foreign countries may be considered as laboratories continually

---

"equitable action." *MacKellar v. Rogers*, 109 N. Y. 468 (1888); *Manhattan Co. v. Hammerstein Co.*, 184 App. Div. (N. Y.) 440 (1918). This is to resurrect old distinctions and seems unjustified. *Contra*: *Herb v. Metropolitan Hospital*, 80 App. Div. (N. Y.) 147 (1903); *Maag v. Maag Gear Co.*, 193 App. Div. (N. Y.) 759 (1920); *Di Menna v. Cooper & Evans Co.*, n. 22, *supra*. Cf *McCaskill, Actions and Causes of Action*, 34 Yale L. J. 614, 632 n.

<sup>61</sup>*Brown v. Circuit Judge*, 75 Mich. 274 (1889); *Maier v. Same*, 112 Mich. 490 (1897); *Cole v. Realty Co.*, 169 Mich. 347 (1912); *Palmer v. Ins Co.*, 217 Mich. 292 (1922); *Campbell v. Gowans*, 35 Utah 268, 280 (1909); *Callanan v. Judd*, 23 Wis. 343 (1868). The view is that the constitutions establish courts of equity, and the power of the chancellor to pass on the facts, with a verdict of the jury as only advisory, is an inherent characteristic of such courts; see also *State v. Nieuwenhuis*, 207 N. W. (S. D.) 77 (1926).

<sup>62</sup>*Michaelson v. United States*, 266 U. S. 42, 64, (1924) avoiding a decision of the point, upon which lower federal cases had turned, by holding the jury trial provisions of the Clayton Act to apply only to criminal contempt. See below 291 Fed. 940, 946 (1923), "Congress cannot constitutionally deprive the parties in an equity court of the right of trial by the chancellor."

<sup>63</sup>*Basey v. Gallagher*, 1 Mont. 457 (1872); *affd.* 20 Wall. 670, 680 (1874), where, however, the court suggested that a change might be made by statute. See, however, *Arnold v. Sinclair*, 12 Mont. 248, 277 (1892).

<sup>64</sup>*Brown v. Greer*, 16 Ariz. 215; *Ely v. Early*, 94 N. C. 1 (1886); cases collected 35 C. J. 161.

<sup>65</sup>See *Phillips v. Gorham*, 17 N. Y. 270, 275 (1858); *Mellon v. Mellon*, 27 Abb. N. C. (N. Y.) 99 (1891); and the principal case.

<sup>66</sup>As are "equity" cases generally. *Di Menna v. Cooper & Evans Co.*, n. 22, *supra*; *Carroll v. Bullock*, n. 24, *supra*.



experimenting with various forms of trial tools. The experience in one state such as New York, on a subject such as this is considerable; when to it is added the experience of many other tribunals very definite conclusions seem possible. On our present question the conclusion from this experience seems clear and definite; one way leads to confusion and the other to comparative simplicity. It is to be regretted that the *Susquehanna* decision took the former course.<sup>67</sup>

---

<sup>67</sup>I am indebted to my students, Messrs. Meade Treadwell and L. H. Surbeck for valuable citations.